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Christopher Uchenna Efogwo v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-2–01 OF 2016
ZAWAWI SALLEH, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
22 AUGUST 2017

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant found guilty of trafficking in dangerous drugs and sentenced to mandatory death penalty — Whether links in chain of custody established — Whether appellant had knowledge of drugs — Whether appellant failed to rebut presumption of trafficking under s 37(da)(xvi) of the Dangerous Drugs Act 1952 on balance of probabilities — Dangerous Drugs Act 1952 ss 37(da)(xvi) & 39B(1)(a)

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The appellant was arrested at the KLIA Sepang and upon conducting an x-ray scan on the appellant, SP8 confirmed that there were capsule-shapes foreign object in the appellant's abdomen. During the period of detention, a total of 44 capsules were excreted through the bowel movement of the appellant. The chemist ('SP4') confirmed and certified that the 44 capsules contained 509.2g of methamphetamine. The appellant was then charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the prosecution's case, the learned judge found that prima facie case was proven against the appellant. The learned judge had made positive finding that the appellant was in possession of the impugned drugs and went on to invoke the presumption of trafficking under s 37(da) of the Act. The appellant was subsequently called upon to enter his defence. In his defence, the appellant testified that he had no knowledge of the substance he swallowed and that he had swallowed the impugned drugs because he was forced by Bos to do so. He had a great fear that his family would be harmed if he did not obey Bos's instruction. At the end of the trial, the learned judge held that the defence put forth by the appellant was mere fiction, afterthought and unreasonable. The learned judge concluded that the appellant's defence had failed to cast reasonable doubt on the prosecution's case on the balance of probabilities; and the appellant had also failed to rebut the presumption of trafficking under s 37(da)(xvi) of the Act. The appellant was accordingly convicted and sentenced to the mandatory death penalty. In the present appeal, the appellant raised two grounds which were: (a) the learned judge erred in law and/or in fact in convicting the appellant despite the prosecution's failure to establish a proper chain of custody of the impugned drugs; and (b) the learned judge erred in law and/or in fact in holding that the appellant had the requisite knowledge of the impugned drugs. In relation to the

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first ground, the appellant submitted that there was discrepancy as to the weight of the impugned drugs between P16 which was prepared by the investigating officer ('SP10') and the chemist report ('P18') prepared by SP4.

Held, dismissing the appeal and affirming the appellant's conviction and sentence:

(1) Learned counsel had failed to cross-examine SP4 on the accuracy of the fact that the 44 capsules found from the appellant's body contained 509.2g of methamphetamine. Failure to cross-examine on a vital issue may deemed to be an acceptance of the same unless there was other compelling evidence to show otherwise. In any event, the discrepancy in the weight of the dangerous drugs should not ipso facto cast a doubt on its identity (see paras 21–22).

(2) The testimonies and the documentary records of the case showed that: (a) the capsules were seized and carefully marked and placed in the plastic bags provided by the hospital by Cpl Zahid bin Zakaria ('SP1') and Cpl Hisham bin Hassan ('SP3'); (b) SP10 confirmed that he had received the plastic bags with each capsule bearing the said markings and SP10 handed over all the capsules contained in a box marked as 'A' ('P19') to SP4; (c) SP4 confirmed that she had received P19 from SP10; and (d) during the trial, SP1, SP3, SP4 and SP10 testified in great details as to how the exhibits were seized, marked and kept while in their custody until the exhibits were sent to SP4 and then produced in court. Therefore, the links in the chain of custody were adequately established (see paras 25–26).

(3) The defence of the appellant that he was forced by Bos to swallow the capsules was unreasonable. When the appellant embarked at KLIA Sepang, he was no longer under the watch of Bos and his bodyguards. He had all the opportunity and time, if indeed he was under duress, to alert the Malaysian authorities of his condition. The appellant failed to do so. The court entertained no doubt that the capsules were swallowed by the appellant voluntarily. On the facts and circumstances of the case, the learned judge was entitled to infer knowledge on the part of the appellant (see paras 39 & 42).

(4) The court agreed with the learned judge that the appellant had failed to rebut the presumption of trafficking under s 37(da)(xvi) of the Act on the balance of probabilities. As the quantity involved was large, it would verily be inferred that the impugned drugs were not intended for his own personal consumption. Indeed, the appellant was engaged in trafficking in dangerous drugs. The court was satisfied that the evidence against the appellant was overwhelming and the prosecution had proved its case beyond reasonable doubt (see paras 43–44).

[Bahasa Malaysia summary

Perayu ditangkap di KLIA Sepang setelah menjalankan imbasan x-ray terhadap perayu, SP8 mengesahkan bahawa terdapat objek asing berbentuk kapsul dalam abdomen perayu. Sewaktu tempoh tahanan, keseluruhan 44 kapsul telah dikeluarkan melalui pergerakan usus perayu. Ahli kimia (SP4) mengesahkan dan memperakui bahawa 44 kapsul mengandungi 509.2g methamphetamine. Perayu kemudian dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pada akhir kes pendakwaan, hakim yang bijaksana mendapati bahawa kes prima facie telah dibuktikan terhadap perayu. Hakim yang bijaksana telah membuat dapatan positif bahawa perayu memiliki dadah yang dipersoalkan dan membangkitkan anggapan pengedaran di bawah s 37(da) Akta. Perayu kemudiannya dipanggil untuk memasukkan pembelaan. Dalam pembelaannya, perayu memberi keterangan bahawa dia tidak mempunyai pengetahuan terhadap bahan yang ditelan dan bahawa dia menelan dadah yang dipersoalkan kerana dia dipaksa oleh Bos untuk berbuat demikian. Dia amat khuatir bahawa keluarganya akan dicederakan jika dia tidak mengikut arahan Bos. Pada akhir perbicaraan, hakim yang bijaksana memutuskan bahawa pembelaan yang dikemukakan oleh perayu hanyalah rekaan, sesuatu yang difikirkan kemudian dan tidak munasabah. Hakim yang bijaksana memutuskan bahawa pembelaan perayu telah gagal untuk melemparkan keraguan munasabah terhadap kes pendakwaan atas imbangan kebarangkalian; dan perayu juga gagal untuk mematahkan anggapan pengedaran di bawah s 37(da)(xvi) Akta. Perayu telah disabit dan dihukum sewajarnya dengan hukuman mati mandatori. Dalam rayuan ini, perayu membangkitkan dua alasan yang mana: (a) hakim yang bijaksana terkhilaf dalam undang-undang dan/atau fakta dalam menyabitkan perayu walaupun pendakwaan gagal untuk membuktikan satu rantaian jagaan sewajarnya terhadap dadah dipersoalkan; (b) hakim yang bijaksana terkhilaf dalam undang-undang dan/atau fakta dalam memutuskan bahawa perayu mempunyai pengetahuan terhadap dadah dipersoalkan. Berkaitan dengan alasan pertama, perayu mengemukakan bahawa terdapat percanggahan dengan berat dadah yang dipersoalkan antara P16 yang telah disediakan oleh pegawai penyiasat (SP10) dan laporan ahli kima (P18) yang disediakan oleh SP4.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman perayu:

(1) Peguam terpelajar gagal untuk memeriksa balas SP4 untuk ketepatan fakta bahawa 44 kapsul dijumpai dari badan perayu mengandungi 509.2g methamphetamine. Kegagalan untuk memeriksa balas terhadap isu penting boleh dianggap untuk menjadi penerimaan yang sama kecuali terdapat keterangan kukuh untuk menunjukkan sebaliknya. Dalam apa keadaan, percanggahan dalam berat dadah berbahaya tidak

A sepatutnya ipso facto melemparkan keraguan terhadap identitinya (lihat perenggan 21–22).

(2) Testimoni dan rekod dokumentar kes menunjukkan bahawa: (a) kapsul dirampas dan ditandakan dengan teliti dan diletakkan dalam beg plastik
B yang disediakan oleh hospital oleh Cpl Zahid bin Zakaria ('SP1') dan Cpl Hisham bin Hassan ('SP3'); (b) SP10 mengesahkan bahawa dia telah menerima beg plastik dengan setiap kapsul yang mengandungi tanda tersebut dan SP10 menyerahkan hampir kesemua kapsul yang terkandung dalam kotak yang ditandakan sebagai 'A' ('P19') kepada SP4;
C (c) SP4 mengesahkan bahawa dia telah menerima P19 dari pada SP10; dan (d) semasa perbicaraan SP1, SP3, SP4 dan SP10 memberi keterangan panjang lebar bagaimana ekshibit dirampas, ditandakan dan disimpan sewaktu dalam jagaan mereka sehingga ekshibit dihantar kepada SP4 dan kemudian dikemukakan di mahkamah. Oleh itu, pautan
D dalam rangkaian jagaan telah dibuktikan secukupnya (lihat perenggan 25–26).

(3) Pembelaan perayu bahawa dia dipaksa oleh Bos untuk menelan kapsul adalah tidak munasabah. Apabila perayu menaiki kapal terbang di KLIA
E Sepang, dia tidak lagi di bawah jagaan Bos dan pengawal peribadinya. Dia mempunyai peluang dan masa, jika sekiranya dia di bawah dures, untuk memberi amaran kepada pihak berkuasa Malaysia akan keadaannya. Perayu gagal untuk berbuat demikian. Mahkamah tidak meragui bahawa kapsul telah ditelan oleh perayu secara sukarela. Atas
F fakta dan keadaan kes itu, hakim yang bijaksana berhak untuk membuat kesimpulan bagi pihak perayu (lihat perenggan 39 & 42).

(4) Mahkamah bersetuju dengan hakim yang bijaksana bahawa perayu telah gagal untuk mematahkan anggapan pengedaran di bawah s 37(da)(xvi)
G Akta atas imbangan kebarangkalian. Memandangkan kuantiti yang terlibat adalah besar, ia sesungguhnya akan disimpulkan bahawa dadah yang dipersoalkan tidak dimaksudkan untuk kegunaan peribadinya sendiri. Sememangnya, perayu telah terlibat dengan pengedaran dadah berbahaya. Mahkamah berpuas hati bahawa keterangan terhadap perayu
H kukuh sekali dan pihak pendakwaan telah membuktikan kesnya melampaui kerayuan munasabah (lihat perenggan 43–44).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest*
I (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Chonmanee Laphathanawat v PP [2017] 4 MLJ 227; [2017] 1 LNS 72, CA (refd)
Chu Tak Fai v PP [1998] 4 MLJ 246, CA (refd)
Derrick Gregory v PP [1988] 2 MLJ 369, SC (refd)
Emmanuel Yaw Teiku v PP [2006] 5 MLJ 209; [2006] 3 CLJ 567, FC (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)
Kasanda Emmanuel lwn Pendakwa Raya [2013] 2 MLJ 833, CA (refd)
Lew Wai Loon v PP [2014] 3 MLJ 325; [2014] 2 CLJ 649, FC (refd)
Mohamed Yusof bin Haji Ahmad v PP [1983] 2 MLJ 167 (refd)
PP v Goh Hock Huat [1994] 3 SLR(R) 375 (refd)
PP v Nagaenthran a/l K Dharmalingam [2011] 2 SLR 830; [2011] SGHC 15, HC (refd)
PP v Ng Peh Tine and Another [2009] SGHC 230, HC (refd)
Tan Seng Ann v PP [1949] 1 MLJ 87 (refd)
Teh Hock Leong v PP [2010] 1 MLJ 741, FC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259, FC (refd)
Uche Francis Chukwusome v PP [2016] MLJU 1170; [2016] 1 LNS 513, CA (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), (da)(xvi), 39B(1)(a), First Schedule
Penal Code s 94

Appeal from: Criminal Trial No 45A-9–01 of 2013 (High Court, Shah Alam)

Kuldeep Kumar (J Kuldeep Kumar & Co) for the appellant.
Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged in the High Court at Shah Alam with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge read as follows:

> Bahawa kamu pada 24.3.2012, jam lebih kurang 8.15 pagi sehingga jam lebih kurang 6.30 petang, bertempat di tandas Wad 6C, Bilik 27, Hospital Serdang, di dalam Daerah Sepang di dalam Negeri Selangor Darul Ehsan telah memperedarkan dadah berbahaya iaitu Methamphetamine sejumlah berat 509.2 gram dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a), Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] At the conclusion of the trial, the appellant was found guilty and was accordingly convicted and sentenced to the mandatory death penalty ('the impugned decision').

[3] Being dissatisfied with the impugned decision, the appellant appealed to this court. Hence, this appeal.

[4] We heard the appeal on 10 January 2017. At the conclusion of arguments, we dismissed the appeal and affirmed the decision of the learned High Court judge ('the learned judge'). We now give our reasons.

THE BACKGROUND

The prosecution's case

[5] The case brought by the prosecution against the appellant and on which he was convicted may be summarised as follows:

(a) on 23 March 2012, at about 7.05pm, Insp Sherman Jackson Jon Bosco ('SP6') and his team from Bahagian Siasatan Jenayah Narkotik who had been monitoring the exit doors at level 3, MTB KLIA Sepang, had arrested the appellant who was on his way out from the immigration inspection counter at level 3;

(b) the appellant was brought to the Pejabat Jenayah Narkotik, KLIA and thereafter to the Serdang Hospital for an intrusive examination for allegedly concealing drugs in his person;

(c) an x-ray scan was conducted by Norlaili bt Mohd Noor ('SP9'). Upon examining the result, Dr Andy Adib bin Abdul Rahim ('SP8') confirmed that there were capsule-shapes foreign objects in the appellant's abdomen;

(d) the appellant was subsequently detained at ward 6C room 27 from 23–26 March 2012. During that period, the appellant was given medication to flush out those objects. A total of 44 capsules were excreted through the bowel movements of the appellant;

(e) the said capsules were handed over to Kpl Zahid bin Zakaria ('SP1') and Kpl Hisham bin Hassan ('SP3') who in turn handed them to the investigating officer of the case, Insp Amrin bin Mohamad Arif ('SP10'). These capsules were in due course sent by PW10 to the chemist, Puan Norhaya bt Jaafar ('SP4'), for analysis;

(f) based upon the examination and analysis of the exhibits, SP4 confirmed and certified that the 44 capsules found excreted from the appellants' bowel contained 509.2g of methamphetamine; and

(g) the appellant was then charged under s 39B(1)(a) of the Act.

[6] As for other evidence adduced at trial, we will discuss in greater detail as and when necessary in our disposition of the grounds of appeal.

Findings at the end of the prosecution's case

[7] Having considered the evidence adduced by the prosecution, the learned judge found that the prosecution had successfully established a prima facie case against the appellant of the charge preferred against him.

[8] The crux of the learned judge's reasoning is as follows:

> 16. Berdasarkan alasan-alasan yang dinyatakan di atas, saya berpuashati pihak pendakwaan telah berjaya membuktikan tertuduh mempunyai jagaan, kawalan dan pengetahuan ke atas dadah tersebut bagi tujuan pengedaran. Ekoran daripada itu, saya mendapati pihak pendakwaan telah membuktikan suatu kes prima facie terhadap tertuduh sebagaimana pertuduhan. Oleh itu tertuduh dipanggil membela diri (rujuk kes-kes *Datuk Seri Anwar (3)* [1999] 2 CLJ 215, *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1 dan juga *Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65 dan kes *Balachandran v PP* [2005] 1 CLJ 89).

(See p 12, appeal record, Vol I).

[9] The learned judge had made a positive finding that the appellant was in possession of the impugned drugs and went on to invoke the presumption of trafficking under s 37(da) of the Act. The learned judge stated:

> 12. Berdasarkan alasan-alasan di atas, saya berpuashati pihak pendakwaan melalui keterangan langsung (*direct evidence*) membuktikan bahawa tertuduh mempunyai milikan fizikal ke atas dadah tersebut.
>
> 13. Dengan mengambilkira jumlah dadah yang berada dalam milikan tertuduh seberat 500.92g methamphetamine, anggapan di bawah s 37(da)(xvi) ADB 1952 adalah terpakai dan tertuduh di dalam kes ini adalah dianggap memperedarkan dadah berbahaya jenis methamphetamine seberat *828.6g* (kes-kes *PP v Mardani Hassan* [2005] 7 CLJ 495 dan *Kasanda Emmanuel v PP* [2013] 2 MLJ 833 dirujuk dan dipakai). (Emphasis added.)

(See pp 11–12, appeal record, Vol I).

[10] The appellant was subsequently called upon to enter his defence.

The defence's case

[11] The evidence for the defence consisted of the sole testimony of the appellant himself. His narration may shortly be stated as follows:

(a) the appellant is a Nigerian national;

(b) in Nigeria, he was primarily engaged in the business of selling phone and computer accessories;

(c) on 24 November 2014, he came to Malaysia to buy phone and computer accessories. Before coming to Malaysia, his friend, Ifenyi, asked him to come to Lagos. Ifenyi's brother wanted the appellant to carry something for his friend in Malaysia;

(d) the appellant went to Lagos to meet Infenyi and his friend, Bos. A night before his departure, Bos came to the hotel where the appellant was staying with three bodyguards. Bos brought out the capsules and asked the appellant to swallow them. Bos instructed the appellant to deliver the capsules to his brother in Malaysia. Bos did not inform the appellant the content of the capsules. The appellant refused to swallow, saying: 'I am not going to take it and eat it'. Bos started using force and also blackmailed the appellant that if he were to report the matter to the authorities, Bos would harm his family. The appellant did not cancel the trip to Malaysia because he was so worried that his family would be harmed; and

(e) the appellant asserted that he had no knowledge of what he had consumed.

Findings at the end of the case

[12] After evaluating the whole evidence, the learned judge held that the defence put forth by the appellant was mere fiction, afterthought and unreasonable.

[13] The learned judge concluded that the appellant's defence had failed to cast a reasonable doubt in the prosecution's case and on the balance of probabilities, the appellant had also failed to rebut the presumption of trafficking under s 37(da)(xvi) of the Act.

[14] The learned judge explained the basis for his decision at pp 14–16 of the appeal record, Vol I, thus:

> (a) Saya mendapati cerita yang terkandung dalam pembelaan Tertuduh tidak pernah ditimbulkan semasa kes pendakwaan. Saya bersetuju dengan hujahan Timbalan Pendakwa Raya bahawa pembelaan Tertuduh

merupakan suatu pemikiran terkemudian (*afterthought*);

(b) Saya bersetuju dengan hujahan Timbalan Pendakwa Raya sekiranya Tertuduh ingin membantu Bos untuk menyerahkan sesuatu kepada adiknya di Malaysia, adalah tidak perlu Tertuduh dipaksa untuk menelan kapsul-kapsul tersebut. Tertuduh tidak pernah menimbulkan perkara ini semasa beliau ditangkap oleh Pegawai Kastam pada tahun 2012 dan cuma menimbulkan perkara ini dalam tahun 2015.

(c) Adalah tidak munasabah untuk Tertuduh dari Ghana pergi ke Lagos semata-mata untuk mengambil barang kiriman kawannya untuk diserahkan kepada adiknya di Malaysia kerana tujuan Tertuduh datang ke Malaysia adalah untuk membeli peralatan komputer dan telefon. Saya mendapati kesanggupan Tertuduh pergi ke Lagos dan menelan kapsul-kapsul tersebut sebelum bertolak ke Malaysia adalah kerana Tertuduh sudah mengetahui kapsul-kapsul yang ditelan itu adalah dadah untuk diedarkan di Malaysia.

(d) Saya menolak pembelaan Tertuduh bahawa beliau telah dipaksa oleh Bos untuk menelan kapsul-kapsul tersebut jika tidak beliau akan dicederakan. Saya mendapati pembelaan paksaan/duress yang dibangkitkan oleh Tertuduh tidak mewujudkan keadaan paksaan yang 'imminent, extreme and persistent' sebagaimana yang dimaksudkan di bawah seksyen 94 Kanun Keseksaan (kes *Tan Seng Ann v PP* [1949] 15 MLJ 87 dan kes *Public Prosecutor v Osei Yaw Brayek* [1996] MLJU 431 dirujuk).

(e) Saya mendapati Tertuduh tidak akan secara membuta tali sanggup menelan kapsul-kapsul tersebut dalam kuantiti yang banyak ie 44 kapsul tanpa mengetahui isi kandungannya. Apatah lagi Tertuduh menyatakan itu adalah kali pertama beliau bertemu dengan Bos.

(f) Saya mendapati kesanggupan Tertuduh menelan kapsul-kapsul tersebut dalam kuantiti yang banyak kerana Tertuduh mengetahui kapsul-kapsul tersebut adalah dadah berbahaya yang mempunyai nilai pasaran yang tinggi di Malaysia. Pada masa Tertuduh ditangkap di Lapangan Terbang KLIA, tiket kapal terbang Tertuduh mengesahkan bahawa Tertuduh akan berada di Malaysia untuk tempoh selama 6 hari. Tertuduh akan berada di Malaysia untuk tempoh yang singkat. Pada masa yang sama saya mendapati harga dua hala tiket penerbangan mencecah ribuan ringgit. Pada hemat, saya Tertuduh datang ke Malaysia adalah untuk menyerahkan kapsul-kapsul yang mengandungi dadah berbahaya yang ditelannya untuk diserahkan kepada adik Bos yang tinggal di Malaysia.

(g) Saya juga mendapati Tertuduh sudah dewasa dan bukan seorang yang naif untuk dipergunakan oleh orang lain.

THE APPEAL

[15] In urging us to reverse the learned judge's decision, the appellant advanced two grounds as follows:

(a) the learned judge erred in law and/or in fact in convicting the appellant despite the prosecution's failure to establish a proper chain of custody of the impugned drugs; and

(b) the learned judge erred in law and/or in fact in holding that the appellant had the requisite knowledge of the impugned drugs.

GROUND (a)

[16] Learned counsel for appellant submitted the prosecution had failed to prove that the capsules excreted by the appellant were the same capsules analysed by the chemist and produced in court. According to learned counsel, there can be no offence of illicit trafficking of dangerous drug when nagging doubts persist whether the capsules confiscated from the appellant were the same capsules examined by the chemist and confirmed to be methamphetamine, a dangerous drug listed in the First Schedule of the Act.

[17] In a prosecution for violation of the Act, the existence of the dangerous drug is a condition *sine qua non* for conviction. The dangerous drug is itself the very *corpus delicti* of the violation of the law. Therefore, it is essential that the identity of the impugned drugs be established beyond reasonable doubt.

[18] The main criticism levelled at the chain of custody is that there was a discrepancy as to the weight of the impugned drugs between P16 (*lampiran* POL 31 KLIA Sepang 2857/12 prepared by SP10) and P18 (chemist report) prepared by the chemist (SP4). The weight of impugned drugs in P16 is 783.69g whereas in P18 is 677.2g. This discrepancy was never explained. There was also a difference in the markings on the exhibits between P11 (chemist report) and P6 (search list).

[19] With respect, we disagreed with the submission of learned counsel for the appellant.

[20] As regards (a), it is obvious that SP4's weight was in form of net weight (*berat bersih*) whereas SP10's weight was in the form of gross weight. It was stated in P16 as follows:

> NOTA: JUMLAH KESELURUHAN A/B 783.69 GRAM DAN KETULAN SEBANYAK 44 BIJI.

(See p 411, appeal record, Vol 3).

Whereas in P18, it was stated:

> Kesemua 44 ketulan plastik tersebut mengandungi sejumlah 677.2 gram (*berat*

bersih) bahan kristal jernih. Setelah dianalisis saya mendapati bahan tersebut mengandungi 509.2 gram Methamphetamine. (Emphasis added.)

(See p 413, appeal record, Vol 3).

[21] It is pertinent to note that learned counsel had failed to cross-examine SP4 on the accuracy of the fact that the 44 capsules found from the appellant's body contained 509.2g of methamphetamine. Failure to cross-examine on a vital issue may be deemed to be an acceptance of the same unless there is other compelling evidence to show otherwise (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639). It is important to reiterate that what matters most is the weight of the dangerous drugs which formed the subject matter of the charge ie the *corpus delicti* of the offence.

[22] In any event, the discrepancy in the weight of the dangerous drugs should not ipso facto cast a doubt on its identity. We refer to the judgment of Richard Malanjum CJ (Sabah and Sarawak) in *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325; [2014] 2 CLJ 649, wherein at p 334 (MLJ); p 659 (CLJ) His Lordship had stated:

> [27] ... we would say that discrepancies in weight alone of an exhibit such as drug should not *ipso facto* cast doubt on its identity. There are other primary factors to consider such as the facts and/or events that form the foundation for its admission as a piece of evidence. One fact and/or event to consider is whether there is any break in the handling or custody, which tantamount to a break in the chain of evidence. If such event occurred then that should cast a doubt in the exhibit as a reliable and trustworthy piece of evidence.

[23] As regards to the difference in the markings made in respect of exhs P11 and P6, we were of the opinion that the said exhibits had been properly marked and identified during the trial.

[24] In our view, in a drug trafficking case, the prosecution must, as far as is practically possible, establish the chain of custody as follows:

(a) the seizure and marking of the dangerous drug recovered from the accused by the arresting officer;

(b) the handover of the dangerous drug from the arresting officer to the investigating officer;

(c) the hand over by the investigating officer of the dangerous drug to the chemist for chemical analysis; and

(d) the production of the said dangerous drug seized in court as exhibits.

[25] In our view, these links in the chain of custody were adequately established by the testimonies of the prosecution witnesses and the documentary records of the case.

(a) *the first link in the chain of custody*

SP1 and SP3 who were sentries on duty at Serdang Hospital testified that the appellant excreted a total of 44 capsules. After the capsules had been washed by the appellant, the said capsules were seized and carefully marked by each of them respectively and placed in the plastic bags provided by the hospital. All the plastic bags together with the capsules in them were later handed over to the investigating officer, SP10.

(b) *the second link in the chain of custody*

SP10 confirmed that he had received the plastic bags with each capsule bearing the markings made by the respective sentries. SP10 then made the following markings on the 'balutan' of the capsules:

TARIKH PENGELUARAN	MASA	JUMLAH KAPSUL	TANDAAN SENTRI PADA SETIAP BALUTAN KAPSUL	TANDAAN IO
24.3.2012	1. 8.15 pagi	16	SP1: Z1–Z16, 24/3/2012 & tt ringkas	A1–16
	2. 10.20 pagi	17	SP1: H1–H17, 24/3/2012 & tt ringkas	A17–33
	3. 12.45 tengahari	7	SP1: D1–D7, 24/3/2012 & tt ringkas	A34–A40
	4. 2.20 petang	3	SP1: ZZ1–ZZ3, 24/3/2012 & tt ringkas	A41–A43
	5. 6.30 petang	1	SP3: H1, 24/3/2012 & tt ringkas	A44

All the exhibits were kept by SP10 under lock and key. On 9 April 2012, at about 11.12am, SP10 handed over all the capsules contained in a box marked as 'A' (P19) to the chemist, Puan Norhaya bt Jaafar ('SP4') for analysis.

(c) *the third link in the chain of custody*

SP4 confirmed that she had received a box marked as 'A' (P19) from SP10.

[26] The following is the excerpt of SP4's testimony regarding the marking of the exhibits (at pp 88–89, appeal record Vol 2A):

Q: Masa puan serahkan kepada pegawai penyiasat (IO) Insp Amrin bagaimana dengan keadaan kotak itu?

A: Kotak masih lagi dalam keadaan baik dan seal masih lagi dalam keadaan baik.

Q: Sekarang ini?

A: Keadaan yang sama.

Kotak bertanda A ditanda sebagai P19.

Q: Puan boleh camkan barang-barang kes untuk kes ini yang puan terima dan jalankan analisa?

A: Boleh.

Timbalan Pendakwa Raya (TPR) mohon SP4 membuka P19.

Q: Apakah kandungan di dalam kotak A tersebut?

A: Kandungan di dalam kotak A adalah terdapat lima peket plastik yang ditanda dengan AA hingga AE. Saya mulakan satu persatu. Peket AA. Di dalamnya terdapat 16 pembalut kapsul yang ditandakan dengan A1 hingga A16. Cukup 16 di dalamnya.

Plastik bertanda AA di tanda sebagai P20.

16 pembalut kapsul ditanda sebagai P21 (1–16).

A: Seterusnya Peket AB yang berisi 17 pembalut kapsul yang ditandakan dengan A 17 hingga A33. Cukup 17 di dalamnya.

Plastik bertanda AB ditanda sebagai P22.

17 pembalut kapsul ditanda sebagai P23 (1–17)

A: Seterusnya Peket AC yang berisi 7 pembalut kapsul yang ditandakan dengan A34 hingga A40. Cukup 7 di dalamnya.

Plastik bertanda AC ditanda sebagai P24.

7 pembalut kapsul ditanda sebagai P25 (1–7).

A: Seterusnya Peket AD yang berisi 3 pembalut kapsul yang ditandakan dengan A41 hingga A43. Cukup 3 di dalamnya.

Plastik bertanda AD ditanda sebagai P26.

3 pembalut kapsul ditanda sebagai P27(1–3).

A: Seterusnya Peket AE yang berisi 1 pembalut kapsul yang ditandakan dengan A44.

Plastik bertanda AE ditanda sebagai P28. 1 pembalut kapsul ditanda sebagai P29(1).

A: Seterusnya peket plastik Jabatan Kimia Malaysia yang mengandungi baki serbuk yang homogen daripada kesemua 44 kapsul tersebut bakinya dimasukkan ke dalam

A plastik Jabatan Kimia Malaysia yang dibekalkan oleh saya dan ditanda no makmal (PJ) FOR4793/12-0 dan juga tandaan A dan juga terdapat tandatangan saya.

Plastik Jabatan Kimia Malaysia ditanda sebagai P30.

B (d) *the fourth link in the chain of custody*

During the trial, SP1, SP3, SP4 and SP10 testified in great detail as to how the exhibits were seized, marked and kept while in their custody until they were sent to the chemist and later produced in court. They were able to identify the C specific markings made on the exhibits when the exhibits were shown to them during the trial.

[27] In *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551, the Court of Appeal held at pp 568–569:

D First, by way of a general observation, I am of the view that, in a drug trafficking case *what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc and it is in respect of that substance that an accused is charged with* E *trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls*. There should be no confusion between F what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with.

The proof of the chain of evidence is only a method of proving that fact. *The fact* G *that there is 'a gap', does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was* H *analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact*. (Emphasis added.)

[28] We were satisfied that the learned judge did not commit any appealable error in reaching the following conclusion:

I 15. Saya telah meneliti keterangan saksi pendakwaan SP1, SP3, SP4 dan Pegawai Penyiasat SP10, saya berpuashati dadah yang dikemukakan di Mahkamah adalah yang dirampas daripada Tertuduh yang dikeluarkan melalui duburnya.

GROUND (b)

[29] We will now proceed to the next issue: the appellant lacked the requisite knowledge of the impugned drugs.

[30] According to learned counsel, the appellant testified that he had no knowledge of the substance which he swallowed. The appellant further testified that he had swallowed the impugned drugs because he was forced by Bos to do so. He had a great fear that his family would be harmed if he did not obey Bos's instruction.

[31] With respect, we disagreed with the submission. In our view, the learned judge was correct in holding that the defence put forth by the appellant had failed to cast a reasonable doubt in the prosecution's case.

[32] The appellant asserted that he had acted as he did under threat to himself and his family with no knowledge of what he was swallowing and he did that at the behest of Bos.

[33] The critical question to be determined in this context is: whether the appellant can rely on s 94 of the Penal Code which provides:

> 94 Act to which a person is compelled by threats
>
> Except murder, offences included in Chapter VI punishable with death and offences included in Chapter VIA, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, *reasonably cause the apprehension that instant death to that person* will otherwise be the consequence:
>
> Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint. (Emphasis added.)

[34] The following requirements must be satisfied before the appellant's plea of duress may be successful:

(a) the harm that the appellant was threatened with was death;

(b) the threat was directed at the appellant or other persons which would include any of his family members;

(c) the threat was of 'instant' death;

(d) the appellant reasonably apprehended that the threat will be carried out; and

(e) the appellant had not, voluntarily or from a reasonable apprehension of harm himself short of instant death, placed himself in that situation

(*Public Prosecutor v Nagaenthran a/l K Dharmalingam* [2011] 2 SLR 830; [2011] SGHC 15; *Public Prosecutor v Ng Peh Tine and Another* [2009] SGHC 230).

[35] It is trite law that the standard of proof necessary for the defence of duress to succeed is upon a balance of probabilities (see *Chu Tak Fai v Public Prosecutor* [1998] 4 MLJ 246). Duress under s 94 of the Penal Code must be 'imminent, persistent and extreme' (see *Public Prosecutor v Goh Hock Huat* [1994] 3 SLR(R) 375).

[36] In *Mohamed Yusof bin Haji Ahmad v Public Prosecutor* [1983] 2 MLJ 167, the accused admitted that he carried the two bags containing cannabis but maintained that he did so under threat from a male Thai, a Malaysian citizen named Peri bin Safar, whom he met by chance in a hotel in Sadau. The man threatened him with a pistol and told him to carry the two bags across the border to the railway station, Padang Besar and if he did so the Thai promised to pay him RM400, but if he did not do so he would be shot. From Sadau the man gave him a lift on his motorcycle to Pekan Siam and from there he walked across the border and the railway lines to the railway station carrying the bags. He said the man followed him on foot up to the railway station and was about 20 ft or so away when he was arrested by the police. On the issue of duress, the court held as follows:

> Under this section *there must be reasonable fear, at the very time, of instant death*. Persons who do criminal acts from fear of anything but instant death do them at their peril. If an offence is completed when all danger of instant death has been removed the person committing the offence is not protected under this section. Further if the accused on his own accord places himself in a situation by which he became subject to the threats of another person, whatever threats may have been used towards him, the provisions of this section do not apply.
>
> ...
>
> In the present case apart from being threatened by the Thai of being shot the man also followed him on foot by keeping a distance of about 20 feet or so away. However, from the appellant's own version he had complied with the request to carry the two bags to the railway station and had successfully alluded the customs check point. He had reached the station, placed the bags on the platform and had gone to purchase a ticket all indicating that he was leaving Padang Besar. He had been carrying the drug for one and half hours and had made no attempt to approach any member of the public or police authorities for help. In short he had already completed his mission except for the handing over the drugs to the Thai who was according to him also at the station platform and collect the $400 from him. In the circumstances it is my considered judgment that there is nothing to suggest that when the appellant placed the bags on the platform and went to purchase the ticket, such duress was present or continued to be present. (Emphasis added).

(See also *Tan Seng Ann v Public Prosecutor* [1949] 1 MLJ 87).

[37] In the case of *Chu Tak Fai*, the Court of Appeal held at p 264:

> It was settled law since *Tan Seng Ann v PP* [1949] MLJ 87 that a plea of duress under s 94 of the Penal Code (FMS Cap 45) to be successful, *must be imminent, extreme and persistent at the time of the commission of the offence … Under our law of duress, the threatener had to be present to execute the threat of instant death or to cause its execution by the Caucasian then and there if the appellant failed to commit the offence*: see *Mohamed Yusof bin Haji Ahmad v PP* and also *R v Teichelman* [1981] 2 NZLR 64. (Emphasis added.)

[38] In *Derrick Gregory v Public Prosecutor* [1988] 2 MLJ 369, the Supreme Court held:

> It is the crux of the appellant's submission that the appellant committed no offence as he was compelled to do it by threats, in other words, under duress. Section 94 of the law clearly states that except for murder and offences included in Chapter VI punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence.
>
> The law clearly envisages that to constitute threats causing the apprehension that instant death to that person will be the consequence, there must be reasonable fear. Persons who do criminal acts from fear of anything but instant death do them at their peril.

[39] We have scrutinised the evidence on record carefully and we were of the opinion that the defence of the appellant that he was forced by Bos to swallow the capsules was unreasonable. The appellant stated that he travelled alone from Ghana to Lagos, Nigeria and Malaysia. We opined that when he embarked at MTB KLIA Sepang, he was no longer under the watch of Bos and his bodyguards. He had all the opportunity and time, if indeed he was under duress, to alert the Malaysian authorities of his condition. The appellant failed to do so. We entertained no doubt that the capsules were swallowed by the appellant voluntarily.

[40] We agreed with the findings of the learned judge when His Lordship concluded:

> Saya menolak pembelaan Tertuduh bahawa beliau telah dipaksa oleh Bos untuk menelan kapsul-kapsul tersebut jika tidak beliau akan dicederakan. Saya mendapati pembelaan paksaan/duress yang dibangkitkan oleh Tertuduh tidak mewujudkan keadaan paksaan yang 'imminent, extreme and persistent' sebagaimana yang dimaksudkan di bawah s 94 Kanun Keseksaan (kes *Tan Seng Ann v Public Prosecutor* [1949] 1 MLJ 87 dan kes *Public Prosecutor v Osei Yaw Brayek* [1996] MLJU 431 dirujuk).

[41] In this context, in *Chonmanee Laphathanawat v Public Prosecutor* [2017] 4 MLJ 227; [2017] 1 LNS 72, this court observed:

> [36] Obviously, the appellant's behaviour as earlier stated, was inconsistent with the conduct of someone who was under duress. Our finding is supported by the decision of this Court in the case of *Chu Tak Fai v Public Prosecutor* [1998] 4 MLJ 246. Denis Ong JCA delivering the judgment of the court said:
>
> It has been said by the House of Lords in *Director of Public Prosecutions for Northem Ireland v Lynch* [1975] AC 653, per Lord Morris of Borth-y-Gest that (at p 668):
>
> > Where duress is in issue many questions may arise such as whether threats are serious and compelling or whether (as on the facts of the present case may especially call for consideration) a person the subject of duress could reasonably have extricated himself or could have sought protection or had what has been called a 'safe avenue of escape'.
>
> And the Court of Appeal in *R v Sharp* [1987] 1 QB 853 said, per Lord Lane CJ (at p 857):
>
> > No one could question that if a person can avoid the effects of duress by escaping from the threats, without damage to himself, he must do so. In other words, if there is a moment at which he is able to escape, so to speak, from the gun being held at his head by Hussey, or the equivalent of Hussey, he must do so.
>
> In *R v Hudson; R v Taylor* [1971] 2 QB 202, Lord Parker CJ said (at p 206):
>
> > This appeal raises two main questions: first, as to the nature of the necessary threat and, in particular, whether it must be 'present and immediate'; secondly, as to the extent to which a right to plead duress may be lost if the accused has failed to take steps to remove the threat as, for example, by seeking police protection.
>
> And at p 207 he continued:
>
> > In the opinion of this court it is always open to the crown to prove that the accused failed to avail himself of some opportunity which was reasonably open to him to render the threat ineffective, and that upon this being established the threat in question can no longer be relied upon by the defence.
>
> From these excerpts quoted, *it would be observed that one issue which the trial court must consider was whether there was opportunity which was reasonably open to the appellant in our present case, to render the death threat to himself ineffective, by a safe avenue of escape or by seeking police protection*.
>
> ...
>
> *And his right to plead duress might be lost if the appellant failed to take steps to remove the threat by seeking police protection*. (Emphasis added.)

[42] On the facts and circumstances of this case, the learned judge was entitled to infer knowledge on the part of the appellant (see *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209; [2006] 3 CLJ 567; *Kasanda*

Emmanuel lwn Pendakwa Raya [2013] 2 MLJ 833; *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; *Uche Francis Chukwusome v Public Prosecutor* [2016] MLJU 1170; [2016] 1 LNS 513; *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741).

[43] We also agreed with the learned judge that the appellant had failed to rebut the presumption of trafficking under s 37(da)(xvi) of the Act on the balance probabilities. As the quantity involved was large, it would verily be inferred that the impugned drug was not intended for his own personal consumption. Indeed, the appellant was engaged in trafficking in dangerous drugs.

[44] We were satisfied that the evidence against appellant was overwhelming and the prosecution had proved its case beyond a reasonable doubt.

CONCLUSION

[45] For the foregoing reasons, therefore, we had dismissed the appeal and affirmed the appellant's conviction and sentence. The appellant's conviction is safe.

Appeal dismissed; appellant's conviction and sentence affirmed.

Reported by Dzulqarnain Ab Fatar